No. 14-86

IN THE

Supreme Court of the United

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

ABERCROMBIE & FITCH STORES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether Title VII requires employers to ferret out any potential conflicts between their general workplace policies and their employees' religious practices, and whether employers can be held liable even where they have no knowledge of any such conflicts.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing individual liberty and free markets. Cato's Center for Constitutional Studies promotes the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, files briefs in the courts, and produces the *Cato Supreme Court Review.*

This case concerns Cato because it exemplifies how unclear statutory and regulatory burdens can restrict economic liberty, chill employment decisions, and otherwise catch conscientious and law-abiding citizens in no-win situations. In particular, the EEOC's position in this case, if adopted by the Court, would impose on employers subject to Title VII unclear standards for determining when a religious accommodation might be necessary, and would shift the burden of coming forward with information regarding the need for such an accommodation from the individual to the employer. Cato believes that employers should have fair notice of their statutory and regulatory obligations, and that employees who seek religious (or other) accommodations from their employers do so consistent with personal responsibility.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

At its core, this case presents the question of when an employer must initiate a dialogue with its employee or prospective employee about any possible religious accommodations that may be necessary under Title VII. The answer is that the employer must have actual notice of a potential conflict between an employee's religious practices and the employer's workplace rules and policies—and that the employee bears the burden of providing that notice. Any other rule not only foments tremendous awkwardness in the employer-employee relationship, but puts the employer in the untenable position of having to inquire into certain sensitive personal information even as such queries themselves are legally disfavored.

The obligation to consider a reasonable accommodation of a religious practice or observance—a noble legislative goal, to be sure—can only begin when the employer has actual knowledge of a potential conflict between its general workplace rules and policies and an employee's religious practices, as the Tenth Circuit held. While the EEOC and its *amici* agree that they do not care for the actual knowledge standard, that is about all they agree on—each has proposed its own formulation for when an employer has sufficient notice of a conflict. Indeed, the EEOC itself has proposed two or three different standards, none of which is well-defined. If the EEOC and its *amici* cannot discern the proper standard, how are employers supposed to? Such irresolution contravenes foundational principles of fairness and due process.

In any event, an actual-knowledge standard is the only one that makes sense in an accommodation case. This standard has been used in the substantially similar ADA context for years, and using it in Title VII accommodation cases would promote uniformity and consistency of application. It also makes sense in light of the highly personal nature of the interest involved: like the limitations of a disability, the beliefs and practices associated with a particular religion are known only to the person who experiences them.

It is also clear that, where the employer does not have sufficient knowledge of a conflict between religious practices and workplace rules and expectations, the employee must bear the burden of putting the employer on notice. This is again largely driven by the highly personal nature of religious beliefs and practices: the employee is in the best position to have information regarding the nature of his or her religious beliefs and concomitant practices, and hence to come forward with information regarding a potential conflict. Contrary to the assertions made by the EEOC and its *amici*, an employee need not have knowledge of an employer's specific rules or policies in order to spot a potential conflict. An employee's own self-awareness that his religious beliefs are often at odds with societal norms is sufficient to put the employee on notice of a possible conflict. Thus, the employee will be in the best position to broach the need for a potential religious accommodation in nearly every case.

Further, allocating the burden in this manner will protect important public policies. In particular, if an employer can be held liable for not accommodating a religious practice even if the employee has not conveyed

the potential need for such accommodation, the careful employer could be compelled to take actions to assure itself that religion is not an issue—including disclosing all of its reasons for taking an adverse employment action, acting on stereotypes and generalizations, or asking applicants and employees intrusive questions about their religious beliefs and practices. None of this is desirable, to say the least. Moreover, interpreting Title VII in this manner would leave employers open to ambush by their employees and would risk making religion a preferred class vis-à-vis Title VII's other protected classes.

ARGUMENT

I. An Employer Must Have Actual Knowledge Of The Potential Need For A Religious Accommodation To Trigger Title VII Obligations.

The Tenth Circuit found that an employer's Title VII duty to reasonably accommodate is not triggered unless the employer has actual knowledge that an accommodation might be needed for religious reasons. The EEOC apparently believes otherwise, but the Court should affirm the Tenth Circuit's sensible conclusion.

A. The EEOC Does Not Propose a Coherent Alternative Standard.

1. While it contends that actual knowledge is not the proper rule, the EEOC conspicuously never comes out and says what the rule should be. Instead, it vacillates between various renditions of its proposed test. In its merits brief, for example, it claims that "[t]he text of Title VII reaches employers who discriminate based on

what they understand to be religious practices." Brief of Petitioner 18 ("Pet'r Br."). But a few sentences later, the EEOC slightly modifies its position, claiming that an employer may not refuse to hire a person "on the basis of what it *correctly* understands to be a religious practice." Pet'r Br. 18–19 (emphasis added). Further muddying the water is the EEOC's repeated refrain that employers have legal obligations if they merely "suspect a possible conflict." One cannot be sure what that even means—*e.g.*, whether it reflects a "reasonable employer" standard, or even if it is subjective or objective.

The *amicus* briefs supporting the EEOC are also all over the map. *Compare* Brief Amicus Curiae of the Becket Fund for Religious Liberty Supporting Petitioner 8 (Dec. 10, 2014) ("[*A*]*ny* notice of a potential religious conflict should trigger the employer's duty .") *and* Brief of Amicus Curiae the Council on American-Islamic Relations In Support of Petitioner 11–12 (Dec. 10, 2014) ("CAIR Br.") ("[A]n employer has an obligation to offer a reasonable accommodation where they have 'enough information' about an employee's need for religious accommodation from *any* source.") *with* Brief for the State of Arizona et al. as Amici Curiae Supporting Petitioner 5 (Dec. 10, 2014) ("Once the employer knows of, or should know of, a conflict, or the likelihood of a conflict, the employer is then obligated to interact with the job applicant about the likely conflict . . . .") *and* Brief of Amicus Curiae Lambda Legal Defense & Education Fund, Inc. in Support of Petitioner 10 (Dec. 10, 2014) (arguing that "wearing a headscarf to an interview with an employer who forbids headscarf wearing in the workplace . . . 'provid[es] enough information' about a potential conflict over such a ban") *and* Brief of Amici Curiae Fifteen Religious and Civil

Rights Organizations In Support of Petitioner 6 (Dec. 10, 2014) ("Fifteen Religious Orgs. Br.") ("[M]erely by observing an applicant's dress, a potential employer may learn that a work conflict is likely.").

If even the EEOC and its *amici* cannot discern the proper standard, how can employers be expected to?

2. Perhaps because the proposed rule has not been clearly defined, the EEOC offers no clues as to when or how it could be satisfied—except to say it was satisfied on the facts of this case. But such a "rule" offers no guidance to employers on what their duties are. One can with little imagination envision myriad scenarios in which an employer, endeavoring to adhere to the EEOC's "rule," is left adrift, adopting ad hoc policies to fill the void. Say that a man attends an interview with waist-length dreadlocks. On the EEOC's "standard," would it be unlawful for a fashion retailer to reject his application? Should the retailer understand that the hairstyle is religious just because it knows that some Rastafari adherents believe dreadlocks are required? What if the retailer is not well-versed in Rastafarianism? Does the answer change if, prior to the interview, the retailer discovers via the applicant's Facebook page that he is an avid listener of reggae music and friends with several persons who subscribe to Rastafarianism? Does this constitute "enough information" about the applicant's need for a religious accommodation to trigger the retailer's duty? For that matter, is it now the employer's duty to scour the applicant's social media pages and make inferences therefrom?

Or consider, for example, a second-year law student who, during a callback interview with a large firm, is taken to a seafood restaurant. If despite the hiring partner's insistence that the student try the delicious crab cakes, the student opts for salmon instead, should the firm suspect that the student will require a Sabbath accommodation? Does the firm have "enough information" about the student's need for a religious accommodation? What if the student's resume indicates that he serves as the praise and worship leader of his local Seventh-Day Adventist church? Must the firm then broach the conversation about whether a religious accommodation is needed? Does the answer change if the firm discovers pictures on the student's Instagram page depicting him engaged in secular activities during Sabbath hours?

The answer to all of these questions, of course, is "it depends," which is precisely the problem. Employers would be tasked with exactly this kind of religious refereeing under the EEOC's "standard," but would have no measuring stick. The chasm between "correctly understands," "suspects a possible conflict," and the "reasonable employer" is sufficiently wide to reach a whole host of scenarios for which the EEOC's proposal provides no guidance whatsoever.

Employers—indeed, all parties regulated by statute and regulation—need clear guidance as to what their duties are if they are to be expected to comply with them. It is a bedrock principle of our legal system that "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)

("Vague laws may trap the innocent by not providing fair warning."); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) ("[A]gencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" (quoting *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.)). The EEOC's proposed "rule"—if it can be called one—does exactly the opposite; it is not sufficiently clear to put employers on notice of their legal obligations when an incident of non-compliance with neutral workplace rules occurs.

B. An Actual-Knowledge Standard Is Familiar to Employers and Sufficiently Protective of Employers and Employees.

Instead of leaving employers adrift, as the EEOC would have it, this Court should hold that the process of accommodating religious practices and observances can begin only where an employer has actual knowledge of a conflict between workplace rules and a religious practice. This actual knowledge standard, employed in ADA-accommodation cases, is best because it is already familiar to employers and accounts for the inherently personal nature of religious belief and practice.

1. As the Tenth Circuit noted, numerous courts have held that, under the ADA, an employer's obligation to accommodate does not arise until the employee has made

an adequate request for an accommodation. Appendix to Petition for Writ of Cert., at 69a–70a (July 25, 2014) ("Pet. App.") (citing cases). Employers thus are already familiar with the level of knowledge required to trigger an ADA accommodation discussion. Indeed, because the statutes employ similar language, *see Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 & nn. 5 & 6 (10th Cir. 2000) (recognizing the similarities between reasonable accommodation requirements in the ADA and Title VII contexts), imposing the same standard in a Title VII religious accommodation case would promote consistency and certainty. *See Northcross v. Bd. of Educ. of Memphis City Schs.*, 412 U.S. 427, 428 (1973) (stating that similarity in language in two statutes "is, of course, a strong indication that the two statutes should be interpreted *pari passu*"); *see also* H.R. Rep. No. 102-40, pt.2 at 47 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 697 ("A number of other laws banning discrimination, including the [ADA] and the [ADEA] are modeled after, and have been interpreted in a manner consistent with, Title VII. The Committee intends that these other laws modeled after Title VII be interpreted consistently in a manner consistent with Title VII.").

Adapting the ADA's actual-knowledge standard to Title VII accommodation cases also makes good practical sense. Employers are not mind-readers. The highly personal and individualized nature of a disability and the manner in which it impacts a person's ability to do a particular job, and consequently the need for an accommodation, are known only to the employee; so too for religious beliefs and practices. *Compare* Pet'r Br. 32 (under the ADA, an employer has a duty to accommodate if it "know[s] of both the disability *and* desire for accommodation") (emphasis

added), *with* EEOC Compliance Manual § 12-I (July 22, 2008) (available at http://www.eeoc.gov/policy/docs/religion.html) (recognizing religious practices are highly individualized).

As is the case under the ADA, adopting an actual knowledge standard in Title VII religious accommodation cases is not to say that "magic words" are necessary or that the information must come directly from the employee. As Respondent rightly concedes, Brief of Respondent 47 n.6 (Jan. 21, 2015) ("Resp. Br."), it can still be proven that an employer had actual knowledge of a possible conflict between workplace rules and religious practice without evidence that the employee initiated a formal sit-down with the employer, so long as other evidence shows that the employer was actually on notice of the need for an accommodation.

2. A standard short of actual knowledge would leave the hypothetical employers discussed above vulnerable to an EEOC charge and lawsuit. If the benign act of an applicant styling his hair in a particular way, wearing a particular article of clothing, or refusing to eat a certain dish that may be (but is not necessarily) associated with particular religious beliefs is sufficient to put the employer on notice, then *any* form of fashion, grooming, or dietary practice associated with a particular person's "religion"—no matter how idiosyncratic—may lead the EEOC or a court to conclude that the employer "should have" known a religious accommodation was needed. Indeed, an employee who knows that any notice of a potential religious conflict is sufficient notice under Title VII, and who has outwardly displayed some practice associated with his religion, could simply assume that his employer was on notice and then

assume that any adverse employment action related to that practice was taken "because of" his religion. *Cf. Mole v. Buckhorn Rubber Prods., Inc.*, 165 F.3d 1212, 1218 (8th Cir. 1999) (noting that an employee "cannot expect the employer to read [her] mind and know [she] secretly wanted a particular accommodation and [then] sue the employer for not providing it.") (citation omitted). This is particularly true with respect to adherents of lesser-known religions or those members of conventional religions who engage in practices atypical of the mainstream. Employers should not be expected to keep an up-to-date guide to the world's religions in their Human Resources departments, much less require their staff to memorize it.

3. In any event, actual knowledge that a particular non-conforming practice is "religious" must be present in any case that does not involve disparate impact. Here, the EEOC does not advance a disparate impact theory of the case; its theory is one of intentional discrimination. Pet'r Br. 21 (claiming that Respondent failed to hire Ms. Elauf "'because of' an aspect of religious observance and practice"). It is well established that a suit for intentional discrimination can succeed only where adverse action is taken on account of—and not in spite of—the protected trait, which requires actual knowledge of the trait. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 275 (1993). Because practices and observances are not protected as "religion" unless they are taken as part of a sincerely held religious belief, it follows that the employer must know not only of the employee's religious beliefs, but also of the connection between those beliefs and the practices at issue. Put differently, because the EEOC maintains that Respondent subjected Ms. Elauf to

an adverse employment action "because of" her religion, it must show that Respondent *knew* that she engaged in the practice for religious—as opposed to any other—reasons. Respondent simply could not have taken the action "because of" Ms. Elauf's religion if it did not know the religious basis for the offending practice.

II. Employees Must Bear The Burden Of Putting An Employer On Notice Of The Need For A Religious Accommodation.

Regardless of the appropriate knowledge standard, accommodation cases will always present the question of who bears the risk that the employer and employee will not have sufficient information to recognize that an accommodation might be warranted. The inherently personal nature of the interest involved, along with other factors, suggest that employees should bear this burden.

A. Whether a Practice Is "Religious" Is Inherently Unknowable to an Employer.

As the Tenth Circuit properly recognized (citing the EEOC), "religion" does not merely denote membership in a traditional, well-known, or organized religious group, but rather refers to a sincerely held, substantive, and personal belief system concerning ultimate ideas about life, purpose, and death. Pet. App. 15a–19a (citing EEOC Compliance Manual § 12-I). That is consistent with this Court's understanding of religion under the First Amendment. *See, e.g.*, *United States v. Seeger*, 380 U.S. 163, 173, 185 (1965); *Welsh v. United States*, 398 U.S. 333 (1970); *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972); *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450

U.S. 707, 715-16 (1981); *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 834 (1989).

A personal belief system may manifest itself through certain practices and observances. But because a person's "religion" cannot be defined by anyone other than the person holding those beliefs, whether a practice is tied to beliefs is inherently unknowable to anyone other than the person who holds those beliefs and engages in that practice. *See* Pet. App. 41a (citing cases for the proposition that outward manifestations of religious *affiliation* are not sufficient indicia of religious *belief*). This is as true for employers as it is for any third party. An employer simply cannot chalk up a particular practice to "religion" unless it also knows that there are sincerely held, personal beliefs that go along with it.

B. Employees Are Better Positioned Than Employers to Break an Informational Stalemate.

Because of the highly personal nature of religious beliefs and practices, in the ordinary case of a conflict between employer expectations and an employee's religious practices, the employee is in a superior position to know about that conflict and the religious basis for his or her practices. Resp. Br. 48. This is the strongest indication that the burden to put an employer on notice should be placed on the employee. *See, e.g.*, *Smith v. United States*, 133 S. Ct. 714, 720 (2013) ("[W]here the facts with regard to an issue lie peculiarly in the knowledge of a party, that party is best situated to bear the burden of proof.") (quotation marks and alterations omitted). This conclusion is bolstered by several considerations.

1. Placing the burden on the employee is sufficiently protective of employees. An employee, with superior knowledge of the religious basis for his non-conforming practices, can take steps to inform the employer of the conflict whenever the conflict arises. Indeed, an adverse employment action need not spell the end of the accommodation process; in the event of a termination or a failure to hire, the employee can still make his or her employer aware of the religious basis for the conflict and seek to reach a reasonable accommodation.

Instructively, employees bear the burden of coming forward with information sufficient to put their employers on notice that a reasonable accommodation of a disability is necessary under the ADA. *See* EEOC, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (Oct. 17, 2002) (available at http://www.eeoc.gov/policy/docs/accommodation.html) (making clear that a reasonable accommodation must be requested and put the employer on notice that a request is being made for accommodation of a disability, as opposed to making a general statement about workplace or job preferences). It would be odd, to say the least, if what is sufficiently protective of the right to a reasonable accommodation on the basis of disability under the ADA is insufficient to protect the right to a religious accommodation under Title VII.

2. Allocating the burdens in this manner will protect important public policies. In particular, Title VII is a limited intrusion into the ordinary doctrine of employment at will. *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 606 (2008) (employment at will doctrine allows an employer to terminate an employee for a "good reason, bad reason, or

no reason at all") (quotation marks and citation omitted). All else being equal, and in the absence of any indication that a protectable right would be violated, employers should be free to take adverse employment actions for any reason or no reason whatsoever. An employer that has insufficient information to conclude that a failure to comply with a workplace rule is due to "religion," but who knows that it is the employee's responsibility to note the existence of a possible conflict, can take an adverse employment action without fear of liability, consistent with employment-at-will principles. Allocating the burdens in this manner will also ensure that a person who desires a departure from the status quo should exercise personal responsibility for requesting it. *See, e.g.*, *Roberts v. County of Fairfax, Va.*, 937 F. Supp. 541, 549 (E.D. Va. 1996) (finding, in ADA accommodation case, that employer did not violate ADA by failing to unilaterally offer accommodation where none was requested because "[t]o rule otherwise here would effectively countenance an erosion of personal responsibility that finds no basis in the ADA or sound public policy").

3. The EEOC and supporting *amici* contend that placing the burden on the employee will leave job applicants insufficiently protected because they cannot be expected to know all of the rules with which they will be expected to comply at the time they apply. As Respondent rightly notes, it is the rare occasion when an employee will not be in a position to recognize the conflict between his/her practice and workplace rules. Resp. Br. 48-49. After all, if an employee does not know his religious practices, it would contravene Title VII even to call them "religious." In any case, it would make no sense to craft a rule based on such an exceptional (if not impossible) case.

More practically, though, this apparent harshness is tempered by the fact that job applicants with sincerely held religious beliefs and practices do not live in a bubble. As *amici* supporting the EEOC have recognized, many—if not most—employers impose grooming and dress requirements on their employees and/or have expectations regarding employees' ability to work on weekends. *See* Fifteen Religious Orgs. Br. 5 (stating that the need for religious accommodation is "particularly acute" in areas of grooming, dress, and scheduling because religious observances "often conflict with mandatory work schedules" and "the public image employers seek to portray"); CAIR Br. 8 (noting that a "broad swathe of religious communities," including Sikhs, Rastafarians, Messianic Christians, and Jews often encounter "employment challenges" because of their "required [] grooming and dress" practices); *see also* Pet. App. 131a ("Employees and prospective employees most frequently request an accommodation because their religious practices conflict with their work schedules."); Pet'r Br. 27 (noting that "[a] number of religions have garb and grooming requirements" that may conflict with an employer's rules"). Prospective employees have enough self-awareness to know when their religious practices—often at odds with societal norms—conflict with these kinds of *general* workplace rules and expectations. And if they are not even aware of the potential conflict, how can an employer—which, again, knows less about the applicant's beliefs and practices—be expected to recognize it?

A self-aware prospective employee could easily take the initiative to raise the issue with the employer in order to determine whether a conflict might exist, even without knowing that a *particular employer* has a specific

grooming or attendance policy. For example, most retail jobs will require employees to be available to work on weekends. An applicant interviewing for a retail position who knows that she will not be available to work from Friday at sundown to Saturday at sundown is certainly in a position to raise the issue with her prospective employer even in the absence of any knowledge about that employer's work-schedule expectations.

In sum, the employee is the party best able to bear the burden of providing an employer with information sufficient to put the employer on notice that a religious accommodation might be necessary. Countervailing concerns regarding the protection of job applicants are insufficiently weighty to dictate a contrary result.

C. Placing The Informational Burden on the Employer Would Lead to Undesirable Consequences.

In contrast to placing the burden on the employee to come forward with information relating to the need for an accommodation, there would be many unwelcome effects if the burden is on the employer to discern whether religion might be a motivating factor behind particular employee actions or behaviors that would otherwise lead to discipline, termination, or a decision not to hire.

1. Averse to the risks of potential future liability under an anti-discrimination statute like Title VII, an employer saddled with the burden of determining whether a particular employee's practice is connected to religion will not be able to take an adverse employment action until it has satisfied itself that religion was *not* the reason

for the offending action—even if there is no evidence to suggest that religion played any role whatsoever.

An investigative prerequisite of this kind is directly at odds with the normal principle of at-will employment. Employers seeking to reassure themselves that religion is not at issue could feel compelled to disclose to employees all of their reasons for taking an adverse employment action in the hopes that, if there is a religious motivation for the employee's action or behavior, the employee will raise it at that time. This turns the normal employer-employee relationship on its head.

2. Allocating the burdens in this manner will also lead employers to engage in unseemly behaviors that the EEOC itself ordinarily discourages. For one, employers will inevitably stereotype their employees. An employer will assess whether a particular instance of non-compliance with workplace rules is based on "religion" (and whether the employer should inquire further into the situation) based on what little they know about religion, much of which will be based on educated (and uneducated) guesses and broad generalizations. For example, imagine an employee who fails to show up for a scheduled Friday evening shift, an infraction that could ordinarily lead to discipline or termination. The employer with the burden of ensuring that the failure to show up at the appointed time was not based on religion, however, would make the determination of how to react based on what little he knows about religion, and would likely treat the employee differently if his name is O'Sullivan than it would if the employee's name is Cohen. Likewise, an employer interviewing a bearded candidate name Muhammad might assume that the candidate would be taking time to pray

five times daily, or that a candidate wearing a crucifix and long skirt might not be able to work on Sundays.

This Court has recognized "that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of" employees as they concern one of Title VII's protected characteristics, *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978) (addressing gender stereotypes), and the EEOC itself has rightfully discouraged this distasteful way of thinking, *see, e.g.*, EEOC, Best Practices for Eradicating Religious Discrimination in the Workplace (July 23, 2006) (available at http://www.eeoc.gov/policy/docs/best_practices_religion.html) (Employers should "avoid assumptions or stereotypes about what constitutes a religious belief," and managers "should be trained not to engage in stereotyping based on religious dress and grooming practices.").

This general aversion to stereotyping is justified, as it harms everyone. Employees who outwardly manifest a connection to a well-known religion might be unfairly assumed to adhere to all of the common practices of that group when they do not, and people who outwardly manifest nothing commonly associated with a major religious practice might be unfairly assumed to have no religious beliefs. Placing the burden of coming forward with information relating to the need for a religious accommodation on the employee would allow the employer to ignore these stereotypes, as it should.

A second unseemly practice that will naturally follow from placing the informational burden on employers is that employers will be led to make inquiries into their

employees' private religious practices. This will often follow on the stereotypes discussed above. When, based on stereotypes, it appears that an employee might engage in a religious practice that conflicts with a workplace rule or business need, the employer will have no choice but to ask questions and take other actions designed to "flush out" information regarding the employee's religious practices. Given the personal, private nature of religious beliefs, and the societal presumption that the person who holds them decides when and how to make them known, asking questions of this kind is in very poor taste.

Although the EEOC now apparently believes that asking questions designed to bring to light religious conflicts is desirable because it would further Title VII's supposed "objective of promoting dialogue," Pet'r Br. 26, it is exactly the kind of behavior that the EEOC typically discourages. *See* EEOC, Pre-Employment Inquiries and Religious Affiliation or Beliefs (available at http://www.eeoc.gov/laws/practices/inquiries_religious.cfm) (last visited Jan. 27, 2015) ("Questions about an applicant's religious affiliation or beliefs are generally viewed as non job-related and problematic under federal law."). In any event, if Title VII intends to promote dialogue between employer and employee, it intends to promote dialogue in reaching an accommodation *once an actual conflict is identified*, not an intention to gin up a conflict where none is otherwise apparent. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986) (approving of decisions finding that "bilateral cooperation is appropriate *in the search for an acceptable reconciliation* of the needs of the employee's religion and the exigencies of the employer's business.") (quotation marks and citations omitted) (emphasis added).

3. Placing the informational burden on the employer also puts employers at great risk of ambush. An employee could say and do nothing substantial, leaving only subtle clues as to his or her religious practices that could be used against the employer later. The religious basis for the conflict will then be known only when he or she files a charge with the EEOC. Title VII is a statute aimed at "eradicating discrimination," *Landgraf v. USI Film Prods.*, 511 U.S. 244, 254 (1994) (quotation marks omitted), not imposing liability for liability's sake. It should be interpreted and applied in a manner that protects the well-meaning and conscientious employer, particularly where (as here) disparate impact is not alleged.

4. Finally, while Title VII should and must protect employees from discrimination based on religion, its protections cannot be made so robust as to essentially require employers to grant preferential treatment on the basis of a protected characteristic. Placing the informational burden on employers and thereby forcing them to investigate whether their employees are not complying with neutral workplace rules for religious reasons—as opposed to secular reasons—runs the risk of making "religion" a preferred class, as opposed to merely a protected one. No one suggests, for instance, that an employer make inquiries into an employee's race, gender, or national origin before taking an employment action in order to ensure that a non-obvious characteristic associated with race, gender, or national origin does not inadvertently play a role in the decision. Religion must be placed on even footing with Title VII's other protected classes, not elevated above them.

It is no answer to suggest that Title VII itself treats religion more favorably than other protected characteristics by requiring an accommodation for religious practices but not for practices that are associated with other protected characteristics. *Cf.* Fifteen Religious Orgs. Br. 8 (stating that "religion requires special treatment"). That is not how Title VII works. Unlike the ADA, Title VII is not drafted in a way that makes the failure to accommodate a religious practice unlawful so long as the accommodation would not cause an undue burden. Instead, Title VII is drafted to protect "religion"—including religious practices—but to *exclude* from that protection any practice that an employer demonstrates that it could not "reasonably accommodate . . . without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j); *see also Ansonia*, 479 U.S. at 63 n.1 (stating that the "reasonable accommodation duty was incorporated into the statute[] somewhat awkwardly"). Religious practices are accordingly entitled to *less* protection than Title VII's "core" protections (race, color, religious belief, sex, and national origin). While the net effect of the provision is to require an accommodation for practices associated with sincerely held religious beliefs when one can be afforded without undue hardship on the employer's business, the accommodation merely puts religious practices on par with Title VII's other protected characteristics. It is not "special treatment." *Cf.* Fifteen Religious Orgs. Br. 8.

In sum, considerations of practicality and policy dictate that, if anyone is to bear the ultimate burden of putting an employer on notice of a need for a religious accommodation, it must be the employee.

CONCLUSION

Amicus respectfully asks that the Court affirm the judgment below.

Respectfully submitted,

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